Table of Contents

CHAPTER 5 104
Foreign Relations 104
A. EXECUTIVE BRANCH DISCRETION OVER FOREIGN RELATIONS 104
Detroit International Bridge: Constitutionality of International Bridge Act 104
B. ALIEN TORT CLAIMS ACT AND TORTURE VICTIM PROTECTION ACT 110
1. Overview 110
2. Extraterritorial Reach of ATS: *Kiobel v. Royal Dutch Petroleum Co.* 111
3. Cases Decided Subsequent to *Kiobel* 117
a. Balintulo v. Daimler AG *(Apartheid litigation)* 117
b. Sarei v. Rio Tinto 119
C. ACT OF STATE AND POLITICAL QUESTION DOCTRINES 119
1. *Bernstein v. Kerry* 119
2. *Alaska v. Kerry* 122
Cross References 122

CHAPTER 5

Foreign Relations

A. EXECUTIVE BRANCH DISCRETION OVER FOREIGN RELATIONS

Detroit International Bridge: Constitutionality of International Bridge Act

On August 30, 2013, the United States filed its brief in support of its motion to dismiss the third amended complaint brought by plaintiffs, Detroit International Bridge Company ("DIBC") and Canadian Transit Company ("CTC"). Plaintiffs sued multiple federal defendants, including the Department of State, in U.S. District Court for the District of Colombia, alleging multiple claims based, *inter alia*, on the decisions to grant a Presidential Permit allowing a new bridge to be constructed across the Detroit River and to approve an agreement between Michigan and Canada pertaining to the new bridge. Plaintiffs alleged, *inter alia*, that the new bridge would compete with their existing bridge and prevent them from building an additional bridge span. *DIBC et al. v. United States*, No. 10-CV-476 (D.D.C.). See Chapter 11.F.2. regarding issuance of the permit. Excerpts from the U.S. brief appear below (with footnotes and citations to the record omitted). The brief is available at *www.state.gov/s/l/c8183.htm*. The first excerpt is from the section in which the United States addresses plaintiffs' claim that the International Bridge Act, under which the permit for the new bridge was granted and the Michigan-Canada agreement approved, is unconstitutional. The second excerpt is from the brief's discussion of plaintiffs' claims under the Administrative Procedure Act ("APA"). Both excerpts discuss the discretion afforded the executive branch in matters affecting foreign relations.

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A. Factual Background

Congress enacted the original "Act to authorize the construction and maintenance of a bridge across Detroit River within or near the city limits of Detroit, Michigan" on March 4, 1921 (the "1921 ATC Act"). 41 Stat. 1439. The statute gave the American Transit Company permission to build, operate and maintain a bridge in or near Detroit, Michigan. Before it could begin construction, however, ATC was required to obtain the "proper and requisite authority" for construction from the Canadian government. *Id.* Congress specifically reserved the right to "alter, amend, or repeal this Act." *Id.* at Sec. 3.

Two months later, on May 3, 1921, the Canadian Parliament passed an "Act to incorporate The Canadian Transit Company" ("CTC"). 11-12 George V. Ch. 57 (Can.) (the "1921 CTC Act"). The 1921 CTC Act established the CTC, and provided it with a wide range of authority to build a number of infrastructure works including a bridge. *Id.* at Sec. 1-8. The 1921 CTC Act provided CTC the right to "construct, maintain, and operate a railway and general traffic bridge across the Detroit River from some convenient point, at or near Windsor, Ontario" to somewhere in Michigan. *Id.* at Sec. 8(a). The CTC Act granted the permission to build 20 miles of railway, lay gas pipes, water pipes, and electrical cables and imbued CTC with the powers of a Canadian railway company. *Id.* at 8(a-j). The 1921 CTC Act also prohibited actual construction without "an Act of the Congress of the United States or other competent authority…authorizing or approving" the bridge. *Id.* at Sec. 9. The remainder of the Act permitted a number of activities such as issuing bonds, borrowing money, mortgaging property, and giving equal rights of passage to other companies, among others. *Id* at Secs. 10-21.

Over the course of the next several years, Congress passed three minor amendments to the 1921 ATC Act, extending the deadlines for ATC to begin and complete construction, and giving ATC the right to sell, assign, transfer, or mortgage its interests under the 1921 ATC Act. *See* "the 1924 ATC Amendment," 43 Stat. 103; the "1925 ATC Amendment," 43 Stat. 1128; and the "1926 ATC Amendment," 44 Stat. 535 (together with the 1921 ATC Act collectively referred to as the "ATC Acts"). None of these statutes altered the original language of the authorization to "construct, maintain, and operate" a bridge in or near Detroit, Michigan. Each of them expressly reserved the United States' right to "alter, amend, or repeal" the law.

The bridge was opened in 1929, and came to be known as the Ambassador Bridge. In 1972, Congress passed the International Bridge Act ("IBA"), which provided advance Congressional consent to international bridges subject to approvals by various executive agencies. 33 U.S.C. § 535 *et seq*. Among the provisions of the IBA, Congress gave its consent for States to enter into agreements with the governments of Canada or Mexico for the construction, maintenance of operation of bridges. *Id.* at 535a. Congress conditioned the effectiveness of the agreements on the approval of the Secretary of State. *Id.* The IBA also recognized that the construction of international bridges implicated the President's authority over foreign affairs, and provided that a bridge could not be constructed without the President's approval. *Id.* at 535b.

Plaintiffs allege that they now seek to build a new span of the Ambassador Bridge (the "New Span") to upgrade the existing facility and decrease maintenance costs. At the same time, the State of Michigan is working with Canada to construct a new bridge between Windsor, Ontario and Detroit, Michigan (referred to alternatively as the Detroit River International Crossing ("DRIC") or the New International Trade Crossing ("NITC")). Through numerous causes of action, Plaintiffs allege that the Federal Defendants' actions with regard to the New

Span and the NITC violate the United States Constitution, and the ATC Acts and CTC Acts, as well as the 1909 Boundary Waters Treaty between the United States and Canada. All of Plaintiffs' claims either lack jurisdiction or fail to state a valid claim for relief. They must be dismissed under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

B. Count One Fails To State A Valid Claim Of Unconstitutional Delegation Of Power Under the 1972 International Bridge Act

The State Department's authority to approve the Crossing Agreement was properly granted by Congress in the 1972 International Bridge Act. Plaintiffs' claim that the IBA is an unconstitutional delegation is incorrect on its face, both as to their characterization of the grant of authority and as to their assertion that there is no intelligible principle to guide the Department's exercise of that authority. Count One should therefore be dismissed under rule 12(b)(6).

1. The 1972 IBA does not delegate Congress' power under the foreign compacts clause

Plaintiffs assert that the IBA unconstitutionally delegates to the State Department Congress's power under Article 1, § 10 of the U.S. Constitution to consent to agreements or compacts between states and foreign powers. This is demonstrably incorrect as a matter of statutory language and legislative history. In fact, Congress itself has exercised its Article 1, § 10 power by consenting in advance to such agreements or compacts relating to international bridges. 33 U.S.C. § 535a. At the same time, Congress conditions the effectiveness of any such agreement on its approval by the Secretary of State. *Id.*

At the time of enactment, Congress made clear that it was separating Congress's consent to interstate compacts, on the one hand, and the conditioning of their effectiveness on approval by the Secretary of State, on the other. The House report accompanying the Act expressly discussed the two different decisions, noted the extensive discussion on the subject of constitutionality that had taken place in the hearing on the Act, and adverted to (and attached) a memorandum on the subject provided by the Legal Adviser of the Department of State. H.R. Rep. 92-1303, 92nd Cong., 2d Sess. 4 (1972). The report observed that advance consent to compacts was necessary to accomplish the purpose of the IBA:

> Since this proposed act is designed to eliminate the necessity of ad hoc congressional consideration of international bridges, it would be anomalous to grant consent…but then require ad hoc [congressional] approval of the agreements pursuant to which they were to be constructed.

Id. The Legal Adviser's memorandum to Congress concluded that "Congress may, under the Constitution, grant consent in advance to compacts and agreements between states and their subdivisions and foreign governments, and . . . such consent may be conditioned on approval of the terms of such agreements by the Department of State." *Id*. at 15. The report also made clear why Congress wished the Department of State to approve such compacts and agreements. The Legal Adviser's memorandum to Congress observed:

> In the past, bridge agreements…have not been reviewed by anyone at the federal level for possible impact on foreign policy. We believe such a review would be in the national interest, and further believe that the Secretary of State would be an appropriate person to conduct such a review.

Id. at 12. Accordingly, Plaintiffs' claim that the IBA is an unconstitutional delegation of power ignores the fact that Congress was well aware of the constitutional limits of its power, and specifically drafted the statute to avoid an impermissible delegation. Congress is the entity giving its consent to the agreements between the States and foreign nations. The agreement's

effectiveness is conditional on the Secretary of State's approval after review for foreign policy concerns. The Secretary of State has not been delegated Congress' foreign compact clause power, and Plaintiffs cannot therefore state a valid claim under the non-delegation doctrine.

2. Even if the non-delegation doctrine was applicable, Congress supplied an intelligible principle to guide the State Department's actions

Plaintiffs' assertion that the IBA lacks an intelligible principle to guide the Secretary of State's decision-making when approving these agreements is simply incorrect on its face. There is no dispute that Congress may delegate its legislative power to the other branches as long has it has set forth "an intelligible principle to which the person or body authorized to act is directed to conform." *TOMAC v. Norton*, 433 F.3d 852, 866 (D.C. Cir. 2006) (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001)). The statute here satisfies the constitutional requirements.

The Supreme Court has summarized its jurisprudence on this point as follows: "[I]n the history of the Court we have found the requisite 'intelligible principle' lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'" *Whitman*, 531 U.S. at 474 (citing *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)). …

If findings of impermissible delegations are rare, they are rarer still when Congress delegates authority over matters of foreign affairs. The Supreme Court has explained that "Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in the domestic area." *Zemel v. Rusk*, 381 U.S. 1, 17 (1965); *see also U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (noting that in foreign affairs Congress has long granted the Executive "a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved."). This is so because of the "changeable and explosive nature" of international affairs and because the Executive must be able to quickly react to information that cannot be easily relayed to and evaluated by Congress. *Zemel*, 381 U.S. at 17. Moreover, when transacting with foreign nations, the Executive must act with "caution and unity of design." *Curtiss-Wright*, 299 U.S. at 319 (internal quotations and citations omitted). The Supreme Court has concluded that it is therefore unwise to require Congress to establish narrow standards when delegating authority over foreign affairs. *Id*. at 321-22. When looking for the broad general directive that will satisfy the intelligible principle test, the court need not be constrained to testing the statutory language in isolation. *TOMAC*, 433 F.3d. at 866 (citing *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946)). Rather, "the statutory language may derive content from the 'purpose of the Act, its factual background and the statutory context in which they appear.'" *Id*. (quoting *Am. Power & Light Co.*, 329 U.S. at 104). The court must therefore consider the legislative history and factual circumstances surrounding the passage of the IBA in determining whether or not there is an intelligible principle guiding Section 535a of the IBA. *See id*.

Here, there is a framework formed by the statute, the legislative history, Executive Order 11423, 33 Fed. Reg. 11741, as amended, and the long-recognized authority of the Executive branch in matters of foreign policy. 33 U.S.C. §§ 535a, 535b; *see also Presidio Bridge Co. v. Sec'y of State*, 486 F. Supp. 288, 296 (W.D. Tex. 1980) (examining the legislative history of the IBA and noting it is to be read in concert with Executive Order 11423). This framework provides the intelligible principle governing the State Department's review of the terms of any crossing

agreement, including this one. *Michigan Gambling Opposition*, 525 F.3d at 381 (intelligible principle discerned after reviewing the purpose and structure of the challenged statute, which should not be read in isolation). Plaintiffs' proposed attempt to bring a sweeping constitutional challenge to the IBA does not withstand scrutiny.

First, the statute itself is concerned only with international bridges crossing the borders between the United States and Mexico or Canada. 33 U.S.C. § 535. The agreements covered by the statute are agreements between States and the governments of Canada or Mexico. 33 U.S.C. § 535a. It is clear even from these bare facts that the thrust of Congressional concern in the statute centers on matters of foreign policy and international relations with bordering countries. In addition, the State Department's central role in United States foreign policy provides sufficient indication that Congress intended that the State Department's review of agreements between States and foreign countries was to focus on foreign policy interests of the United States. Finally, the legislative history of the 1972 IBA provides even more clarity as to the principle Congress articulated for the State Department to apply. As noted above, the Report from the House Committee on Foreign Affairs explains that the State Department was to review the agreements for "possible impact on foreign policy." H.R. REP. NO. 92-1303, at 12 (1972).

Moreover, the IBA was a coordinated effort between the Executive branch and the Legislative branch to create a uniform system for approval of international bridges. *Presidio Bridge Co.*, 486 F. Supp. at 295-96 ("after four years of work in drafting a bill, the President issued an Executive Order anticipating its final passage…the bill…was passed by a Congress that was well aware of both the provisions of the order and the reason for its existence."). Executive Order 11,423 was drafted in anticipation of the IBA, which would grant advance Congressional approval of international bridges. *Presidio Bridge Co.*, 486 F. Supp. at 296 ("the two documents are compatible with, and companions to one another"); *see also* Executive Order 11423, 33 Fed. Reg. 11741. The Executive Order explains that "the proper conduct of foreign relations requires that executive permission be obtained for the construction and maintenance …of facilities connecting the United States with a foreign country." 33 Fed. Reg. at 11741. Taken together, the statute, legislative history, and Executive Order confirm the principle guiding the State Department's approval of these agreements: they must be reviewed for impacts on U.S. foreign policy and foreign relations. This guidance would handily satisfy the intelligible principle requirement even if the delegation concerned authority over domestic affairs. Given that the delegated authority is a matter of foreign affairs, there is essentially no question that it survives constitutional scrutiny.

This reading of the statute in light of its history is analogous to the Supreme Court's reading of the statute at issue in *Zemel*. In that case, the Supreme Court found that Congress properly granted the State Department the authority to refuse to validate U.S. passports for travel to Cuba. *Zemel*, 381 U.S. at 7. While the statutory language in *Zemel* simply granted the Secretary the authority to grant and issue passports without an explicit guiding principle, the Supreme Court held that the statute "must take its content from history: it authorizes only those passport refusals and restrictions which it could fairly be argued were adopted by Congress in light of prior administrative practice." *Id*. at 17-18 (omitting internal quotation and citation). Thus, the *Zemel* court found it sufficient that Congress delegated authority to the State Department with an understanding of the manner in which the State Department would implement that authority. *Id*. It was not necessary for Congress to spell it out in the statute. *Id*. As explained above, this broad delegation was acceptable to the Court because it would be unwise to

restrict the State Department's actions with a narrower standard given the delicate and quickly changing nature of international relations. *Id*. at 17; *see also Curtiss-Wright*, 299 U.S. at 321-22. Similarly, here, Congress has authorized the State Department to approve agreements with the understanding that the Department will do so only after reviewing such agreements for "impacts on foreign policy." H.R. REP. NO. 92-1303, at 11-15 (1972). Indeed, Congress' understanding of how the State Department will exercise the delegated power is even more clear in this case than it was in *Zemel* because here that understanding is explicitly expressed in the House Committee Report. *Id*. In contrast, the *Zemel* court inferred Congress' understanding from the State Department's "prior administrative practice." *Zemel*, 381 U.S. at 17-18.

The delegation in the IBA thus clearly meets the standard for an intelligible principle as applied to delegations concerning foreign affairs. *Id.; see also Curtiss-Wright*, 299 U.S. at 324, 328 (explaining that the Court should not be hasty to disturb the longstanding legislative practice of delegating broad authority over foreign affairs). A claim challenging the constitutionality of a delegation carries the heavy burden of showing the complete lack of an intelligible principle. *See National Broadcasting Co.*, 319 U.S. at 225-26; *Milk Indus. Found. v. Glickman*, 132 F.3d 1467, 1475 (D.C. Cir. 1998). Because the language, history, and factual context make clear that the State Department is to approve only agreements consistent with U.S. foreign policy, Plaintiffs cannot allege any set of facts which would entitle them to relief on Count One.

* * * *

E. Counts Six And Seven Must Be Dismissed Because Plaintiffs Cannot Establish Standing And Because They Are Not Reviewable Under The APA

* * * *

3. Issuance of the Presidential Permit and approval of the Crossing Agreement are not subject to judicial review because they are agency actions committed to agency discretion by law

Even if the Court were to conclude that the issuance of Presidential Permit by the State Department constituted agency action, rather than Presidential action, the APA still provides no basis for the Court to review Plaintiffs' claims because issuance of the permit and the approval of the Crossing Agreement were undertaken pursuant to executive authority over foreign relations and therefore were committed to agency discretion by law. *Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State, Bureau of Consular Affairs*, 104 F.3d 1349, 1353 (D.C. Cir. 1997) (holding that State Department issuance of visas was unreviewable under the APA as agency action "committed to agency discretion by law.") (citation omitted); *see also Jensen v. Nat'l Marine Fisheries Serv.*, 512 F.2d 1189, 1191 (9th Cir. 1975); 5 U.S.C. § 701(a)(2). "If in the [statute] Congress delegated to the President authority to make a decision in the province of foreign affairs, clearly the courts would have no authority to second-guess the President's decisions or those of his designees with respect thereto." *Rainbow Navigation, Inc. v. Dep't of Navy*, 620 F.Supp. 534, 541 (D.D.C. 1985) *aff'd*, 783 F.2d 1072 (D.C. Cir. 1986) (citing *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294 (1933)).

In *Legal Assistance for Vietnamese Asylum Seekers*, the D.C. Circuit was faced with a claim challenging the State Department's issuance of visas and noted that "the agency is entrusted by a broadly worded statute with balancing complex concerns involving security and

diplomacy." 104 F.3d at 1353. "[W]here the President acted under a congressional grant of discretion as broadly worded as any we are likely to see, and where the exercise of that discretion occurs in the area of foreign affairs, we cannot disturb his decision simply because some might find it unwise or because it differs from the policies pursued by previous administrations." *Id.* (quoting *DKT Memorial Fund Ltd. v. Agency for Int'l Dev.*, 887 F.2d 275, 282 (D.C. Cir. 1989)). "In light of the lack of guidance provided by the statute and the complicated factors involved in consular venue determinations, we hold that plaintiffs' claims under both the statute and the APA are unreviewable because there is 'no law to apply.'" *Legal Assistance*, 104 F.3d at 1353.

Here, the IBA provides broad discretion to the President (in the case of Presidential Permits under 33 U.S.C. § 535b) and to the State Department directly (in the case of approvals of international agreements in 33 U.S.C. § 535a), in areas that involve complex concerns regarding foreign relations, diplomacy, and national interest. "By long-standing tradition, courts have been wary of second-guessing executive branch decisions involving complicated foreign policy matters." *Legal Assistance*, 104 F.3d at 1353. Were this Court to attempt to review the decisions on the Presidential Permit or the Crossing Agreement, there would be no clear standard against which the Court could measure whether the decisions were actually consistent with United States foreign policy (in the case of Crossing Agreements), or whether they were in the national interest (in the case of Presidential Permits). Accordingly, these decisions are not reviewable under the APA, and Counts Six and Seven must be dismissed for failure to state a claim.

* * * *

B. ALIEN TORT CLAIMS ACT AND TORTURE VICTIM PROTECTION ACT

1. Overview

The Alien Tort Claims Act ("ATCA"), also referred to as the Alien Tort Statute ("ATS"), was enacted as part of the First Judiciary Act in 1789 and is now codified at 28 U.S.C. § 1350. It provides that U.S. federal district courts "shall have original jurisdiction of any civil action by an alien for tort only, committed in violation of the law of nations or a treaty of the United States." The statute was rarely invoked until *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); following *Filartiga*, the statute has been interpreted by the federal courts in cases raising human rights claims under international law. In 2004 the Supreme Court held that the ATCA is "in terms only jurisdictional" but that, in enacting the ATCA in 1789, Congress intended to "enable[] federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law." *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). By its terms, this statutory basis for suit is available only to aliens. In an *amicus curiae* memorandum filed in the Second Circuit in *Filartiga v. Pena-Irala,* the United States described the ATCA as one avenue through which "an individual's fundamental human rights [can be] in certain situations directly enforceable in domestic courts." Memorandum for the United States as Amicus Curiae at 21, *Filartiga v. Pena-Irala*, 630 F.2d. 876 (2d Cir. 1980) (No. 79-6090).

The Torture Victim Protection Act ("TVPA"), which was enacted in 1992, Pub. L. No. 102-256, 106 Stat. 73, appears as a note to 28 U.S.C. § 1350. It provides a cause of action in federal courts against "[a]n individual . . . [acting] under actual or apparent authority, or color of law, of any foreign nation" for individuals, including U.S. nationals, who are victims of official torture or extrajudicial killing. The TVPA contains an exhaustion requirement and a ten-year statute of limitations.

The following entries discuss 2013 developments in a selection of cases brought under the ATCA and the TVPA in which the United States participated. Several cases involving claims under the TVPA are discussed in Chapter 10.

2. Extraterritorial Reach of ATS: *Kiobel v. Royal Dutch Petroleum Co.*

As discussed in *Digest 2012* at 127-28, the United States submitted a supplemental brief in the U.S. Supreme Court in *Kiobel v. Royal Dutch Petroleum Co.* in 2012 on the question of whether the ATS allows a cause of action for violations occurring outside the territory of the United States. The Supreme Court issued its opinion on that issue on April 17, 2013. 133 S. Ct. 1659 (2013). For further background on the case, see *Digest 2011* at 129-36.

The Court was unanimous in holding that the claims in this particular case should be dismissed, but there were three separate opinions concurring in the Court's judgment. The majority of the Court reasoned that the principles underlying the presumption against extraterritoriality apply to claims under the ATS, and that "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application." Justice Kennedy wrote a separate concurring opinion emphasizing that the majority opinion properly leaves "open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute." Justice Alito's concurrence, in which Justice Thomas joined, advocates a broader application of the presumption against extraterritoriality than the Court's formulation such that "a putative ATS cause of action will fall within the scope of the presumption against extraterritoriality—and will therefore be barred –unless the domestic conduct is sufficient to violate an international law norm that satisfies *Sosa's* requirements of definiteness and acceptance among civilized nations." Justice Breyer's concurrence, in which Justices Ginsburg, Sotomayor, and Kagan joined, agrees "with the Court's conclusion" that there was no jurisdiction in this particular case, but "not with its reasoning." Specifically, Justice Breyer wrote:

> …I would not invoke the presumption against extraterritoriality. Rather, guided in part by principles and practices of foreign relations law, I would find jurisdiction under this statute where (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a

> safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.

Excerpts from the majority opinion follow.

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* * * *

The question here is not whether petitioners have stated a proper claim under the ATS, but whether a claim may reach conduct occurring in the territory of a foreign sovereign. Respondents contend that claims under the ATS do not, relying primarily on a canon of statutory interpretation known as the presumption against extraterritorial application. That canon provides that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none," *Morrison v. National Australia Bank Ltd.*, 561 U.S. ——, ——, 130 S.Ct. 2869, 2878, 177 L.Ed.2d 535 (2010), and reflects the "presumption that United States law governs domestically but does not rule the world," *Microsoft Corp. v. AT & T Corp.*, 550 U.S. 437, 454, 127 S.Ct. 1746, 167 L.Ed.2d 737 (2007).

This presumption "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991) (*Aramco*). As this Court has explained:

> "For us to run interference in ... a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain." *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 [77 S.Ct. 699, 1 L.Ed.2d 709] (1957). The presumption against extraterritorial application helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches.

We typically apply the presumption to discern whether an Act of Congress regulating conduct applies abroad. See, *e.g., Aramco, supra,* at 246, 111 S.Ct. 1227 ("These cases present the issue whether Title VII applies extraterritorially to regulate the employment practices of United States employers who employ United States citizens abroad"); *Morrison, supra,* at ——, 130 S.Ct., at 2876–2877 (noting that the question of extraterritorial application was a "merits question," not a question of jurisdiction). The ATS, on the other hand, is "strictly jurisdictional." *Sosa,* 542 U.S., at 713, 124 S.Ct. 2739. It does not directly regulate conduct or afford relief. It instead allows federal courts to recognize certain causes of action based on sufficiently definite norms of international law. But we think the principles underlying the canon of interpretation similarly constrain courts considering causes of action that may be brought under the ATS.

Indeed, the danger of unwarranted judicial interference in the conduct of foreign policy is magnified in the context of the ATS, because the question is not what Congress has done but instead what courts may do. This Court in *Sosa* repeatedly stressed the need for judicial caution in considering which claims could be brought under the ATS, in light of foreign policy concerns. As the Court explained, "the potential [foreign policy] implications ... of recognizing.... causes

[under the ATS] should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Id.*, at 727, 124 S.Ct. 2739; see also *id.*, at 727–728, 124 S.Ct. 2739 ("Since many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution"); *id.*, at 727, 124 S.Ct. 2739 ("[T]he possible collateral consequences of making international rules privately actionable argue for judicial caution"). These concerns, which are implicated in any case arising under the ATS, are all the more pressing when the question is whether a cause of action under the ATS reaches conduct within the territory of another sovereign.

These concerns are not diminished by the fact that *Sosa* limited federal courts to recognizing causes of action only for alleged violations of international law norms that are "'specific, universal, and obligatory.'" *Id.*, at 732, 124 S.Ct. 2739 (quoting *In re Estate of Marcos, Human Rights Litigation*, 25 F.3d 1467, 1475 (C.A.9 1994)). As demonstrated by Congress's enactment of the Torture Victim Protection Act of 1991, 106 Stat. 73, note following 28 U.S.C. § 1350, identifying such a norm is only the beginning of defining a cause of action. See *id.*, § 3 (providing detailed definitions for extrajudicial killing and torture); *id.*, § 2 (specifying who may be liable, creating a rule of exhaustion, and establishing a statute of limitations). Each of these decisions carries with it significant foreign policy implications.

The principles underlying the presumption against extraterritoriality thus constrain courts exercising their power under the ATS.

III

Petitioners contend that even if the presumption applies, the text, history, and purposes of the ATS rebut it for causes of action brought under that statute. It is true that Congress, even in a jurisdictional provision, can indicate that it intends federal law to apply to conduct occurring abroad. See, *e.g.*, 18 U.S.C. § 1091(e) (2006 ed., Supp. V) (providing jurisdiction over the offense of genocide "regardless of where the offense is committed" if the alleged offender is, among other things, "present in the United States"). But to rebut the presumption, the ATS would need to evince a "clear indication of extraterritoriality." *Morrison*, 561 U.S., at ——, 130 S.Ct., at 2883. It does not.

To begin, nothing in the text of the statute suggests that Congress intended causes of action recognized under it to have extraterritorial reach. The ATS covers actions by aliens for violations of the law of nations, but that does not imply extraterritorial reach—such violations affecting aliens can occur either within or outside the United States. Nor does the fact that the text reaches "*any* civil action" suggest application to torts committed abroad; it is well established that generic terms like "any" or "every" do not rebut the presumption against extraterritoriality. See, *e.g.*, *id.*, at ——, 130 S.Ct., at 2881–2882; *Small v. United States*, 544 U.S. 385, 388, 125 S.Ct. 1752, 161 L.Ed.2d 651 (2005); *Aramco*, 499 U.S., at 248–250, 111 S.Ct. 1227; *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 287, 69 S.Ct. 575, 93 L.Ed. 680 (1949).

Petitioners make much of the fact that the ATS provides jurisdiction over civil actions for "torts" in violation of the law of nations. They claim that in using that word, the First Congress "necessarily meant to provide for jurisdiction over extraterritorial transitory torts that could arise on foreign soil." Supp. Brief for Petitioners 18. For support, they cite the common-law doctrine that allowed courts to assume jurisdiction over such "transitory torts," including actions for personal injury, arising abroad. See *Mostyn v. Fabrigas*, 1 Cowp. 161, 177, 98 Eng. Rep. 1021, 1030 (1774) (Mansfield, L.) ("[A]ll actions of a transitory nature that arise abroad may be laid as happening in an English county"); *Dennick v. Railroad Co.*, 103 U.S. 11, 18, 26 L.Ed. 439

(1881) ("Wherever, by either the common law or the statute law of a State, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties").

Under the transitory torts doctrine, however, "the only justification for allowing a party to recover when the cause of action arose in another civilized jurisdiction is a well founded belief that it was a cause of action in that place." *Cuba R. Co. v. Crosby*, 222 U.S. 473, 479, 32 S.Ct. 132, 56 L.Ed. 274 (1912) (majority opinion of Holmes, J.). The question under *Sosa* is not whether a federal court has jurisdiction to entertain a cause of action provided by foreign or even international law. The question is instead whether the court has authority to recognize a cause of action under U.S. law to enforce a norm of international law. The reference to "tort" does not demonstrate that the First Congress "necessarily meant" for those causes of action to reach conduct in the territory of a foreign sovereign. In the end, nothing in the text of the ATS evinces the requisite clear indication of extraterritoriality.

Nor does the historical background against which the ATS was enacted overcome the presumption against application to conduct in the territory of another sovereign. See *Morrison, supra,* at ——, 130 S.Ct., at 2883 (noting that "[a]ssuredly context can be consulted" in determining whether a cause of action applies abroad). We explained in *Sosa* that when Congress passed the ATS, "three principal offenses against the law of nations" had been identified by Blackstone: violation of safe conducts, infringement of the rights of ambassadors, and piracy. 542 U.S., at 723, 724, 124 S.Ct. 2739; see 4 W. Blackstone, Commentaries on the Laws of England 68 (1769). The first two offenses have no necessary extraterritorial application. Indeed, Blackstone—in describing them—did so in terms of conduct occurring within the forum nation. See *ibid.* (describing the right of safe conducts for those "who are here"); 1 *id.,* at 251 (1765) (explaining that safe conducts grant a member of one society "a right to intrude into another"); *id.,* at 245–248 (recognizing the king's power to "receiv[e] ambassadors at home" and detailing their rights in the state "wherein they are appointed to reside"); see also E. De Vattel, Law of Nations 465 (J. Chitty et al. transl. and ed. 1883) ("[O]n his entering the country to which he is sent, and making himself known, [the ambassador] is under the protection of the law of nations ...").

Two notorious episodes involving violations of the law of nations occurred in the United States shortly before passage of the ATS. Each concerned the rights of ambassadors, and each involved conduct within the Union. In 1784, a French adventurer verbally and physically assaulted Francis Barbe Marbois—the Secretary of the French Legion—in Philadelphia. The assault led the French Minister Plenipotentiary to lodge a formal protest with the Continental Congress and threaten to leave the country unless an adequate remedy were provided. *Respublica v. De Longchamps,* 1 Dall. 111, 1 L.Ed. 59 (O.T.Phila.1784); *Sosa, supra,* at 716–717, and n. 11, 124 S.Ct. 2739. And in 1787, a New York constable entered the Dutch Ambassador's house and arrested one of his domestic servants. See Casto, The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations, 18 Conn. L.Rev. 467, 494 (1986). At the request of Secretary of Foreign Affairs John Jay, the Mayor of New York City arrested the constable in turn, but cautioned that because "'neither Congress nor our [State] Legislature have yet passed any act respecting a breach of the privileges of Ambassadors,'" the extent of any available relief would depend on the common law. See Bradley, The Alien Tort Statute and Article III, 42 Va. J. Int'l L. 587, 641–642 (2002) (quoting 3 Dept. of State, The Diplomatic Correspondence of the United States of America 447 (1837)). The two cases in which the ATS

was invoked shortly after its passage also concerned conduct within the territory of the United States. See *Bolchos,* 3 F. Cas. 810 (wrongful seizure of slaves from a vessel while in port in the United States); *Moxon,* 17 F. Cas. 942 (wrongful seizure in United States territorial waters).

These prominent contemporary examples—immediately before and after passage of the ATS—provide no support for the proposition that Congress expected causes of action to be brought under the statute for violations of the law of nations occurring abroad.

The third example of a violation of the law of nations familiar to the Congress that enacted the ATS was piracy. Piracy typically occurs on the high seas, beyond the territorial jurisdiction of the United States or any other country. See 4 Blackstone, *supra,* at 72 ("The offence of piracy, by common law, consists of committing those acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to felony there"). This Court has generally treated the high seas the same as foreign soil for purposes of the presumption against extraterritorial application. See, *e.g., Sale v. Haitian Centers Council, Inc.,* 509 U.S. 155, 173–174, 113 S.Ct. 2549, 125 L.Ed.2d 128 (1993) (declining to apply a provision of the Immigration and Nationality Act to conduct occurring on the high seas); *Argentine Republic v. Amerada Hess Shipping Corp.,* 488 U.S. 428, 440, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989) (declining to apply a provision of the Foreign Sovereign Immunities Act of 1976 to the high seas). Petitioners contend that because Congress surely intended the ATS to provide jurisdiction for actions against pirates, it necessarily anticipated the statute would apply to conduct occurring abroad.

Applying U.S. law to pirates, however, does not typically impose the sovereign will of the United States onto conduct occurring within the territorial jurisdiction of another sovereign, and therefore carries less direct foreign policy consequences. Pirates were fair game wherever found, by any nation, because they generally did not operate within any jurisdiction. See 4 Blackstone, *supra,* at 71. We do not think that the existence of a cause of action against them is a sufficient basis for concluding that other causes of action under the ATS reach conduct that does occur within the territory of another sovereign; pirates may well be a category unto themselves. See *Morrison,* 561 U.S., at ——, 130 S.Ct., at 2883 ("[W]hen a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms"); see also *Microsoft Corp.,* 550 U.S., at 455–456, 127 S.Ct. 1746.

Petitioners also point to a 1795 opinion authored by Attorney General William Bradford. See Breach of Neutrality, 1 Op. Atty. Gen. 57. In 1794, in the midst of war between France and Great Britain, and notwithstanding the American official policy of neutrality, several U.S. citizens joined a French privateer fleet and attacked and plundered the British colony of Sierra Leone. In response to a protest from the British Ambassador, Attorney General Bradford responded as follows:

> So far ... as the transactions complained of originated or took place in a foreign country, they are not within the cognizance of our courts; nor can the actors be legally prosecuted or punished for them by the United States. But crimes committed on the high seas *are* within the jurisdiction of the ... courts of the United States; and, so far as the offence was committed thereon, I am inclined to think that it may be legally prosecuted in ... those courts.... But some doubt rests on this point, in consequence of the terms in which the [applicable criminal law] is expressed. But there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a *civil* suit in the courts of the United States; jurisdiction being expressly given to these courts in all

cases where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States...." *Id.*, at 58–59.

Petitioners read the last sentence as confirming that "the Founding generation understood the ATS to apply to law of nations violations committed on the territory of a foreign sovereign." Supp. Brief for Petitioners 33. Respondents counter that when Attorney General Bradford referred to "these acts of hostility," he meant the acts only insofar as they took place on the high seas, and even if his conclusion were broader, it was only because the applicable treaty had extraterritorial reach. See Supp. Brief for Respondents 28–30. The Solicitor General, having once read the opinion to stand for the proposition that an "ATS suit could be brought against American citizens for breaching neutrality with Britain only if acts did not take place in a foreign country," Supp. Brief for United States as *Amicus Curiae* 8, n. 1 (internal quotation marks and brackets omitted), now suggests the opinion "could have been meant to encompass ... conduct [occurring within the foreign territory]," *id.*, at 8.

Attorney General Bradford's opinion defies a definitive reading and we need not adopt one here. Whatever its precise meaning, it deals with U.S. citizens who, by participating in an attack taking place both on the high seas and on a foreign shore, violated a treaty between the United States and Great Britain. The opinion hardly suffices to counter the weighty concerns underlying the presumption against extraterritoriality.

Finally, there is no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms. As Justice Story put it, "No nation has ever yet pretended to be the custos morum of the whole world...." *United States v. The La Jeune Eugenie,* 26 F. Cas. 832, 847 (No. 15,551) (C.C.Mass.1822). It is implausible to suppose that the First Congress wanted their fledgling Republic—struggling to receive international recognition—to be the first. Indeed, the parties offer no evidence that any nation, meek or mighty, presumed to do such a thing.

The United States was, however, embarrassed by its potential inability to provide judicial relief to foreign officials injured in the United States. Bradley, 42 Va. J. Int'l L., at 641. Such offenses against ambassadors violated the law of nations, "and if not adequately redressed could rise to an issue of war." *Sosa,* 542 U.S., at 715, 124 S.Ct. 2739; cf. The Federalist No. 80, p. 536 (J. Cooke ed. 1961) (A. Hamilton) ("As the denial or perversion of justice ... is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned"). The ATS ensured that the United States could provide a forum for adjudicating such incidents. See *Sosa, supra,* at 715–718, and n. 11, 124 S.Ct. 2739. Nothing about this historical context suggests that Congress also intended federal common law under the ATS to provide a cause of action for conduct occurring in the territory of another sovereign.

Indeed, far from avoiding diplomatic strife, providing such a cause of action could have generated it. Recent experience bears this out. See *Doe v. Exxon Mobil Corp.,* 654 F.3d 11, 77–78 (C.A.D.C.2011) (Kavanaugh, J., dissenting in part) (listing recent objections to extraterritorial applications of the ATS by Canada, Germany, Indonesia, Papua New Guinea, South Africa, Switzerland, and the United Kingdom). Moreover, accepting petitioners' view would imply that other nations, also applying the law of nations, could hale our citizens into their courts for alleged violations of the law of nations occurring in the United States, or anywhere else in the world. The presumption against extraterritoriality guards against our courts triggering such serious foreign policy consequences, and instead defers such decisions, quite appropriately, to

the political branches.

We therefore conclude that the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption. "[T]here is no clear indication of extraterritoriality here," *Morrison*, 561 U.S., at ——, 130 S.Ct., at 2883, and petitioners' case seeking relief for violations of the law of nations occurring outside the United States is barred.

IV

On these facts, all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. See *Morrison*, 561 U.S. ——, 130 S.Ct., at 2883–2888. Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices. If Congress were to determine otherwise, a statute more specific than the ATS would be required.

* * * *

3. Cases Decided Subsequent to *Kiobel*

a. Balintulo v. Daimler AG *(Apartheid litigation)*

On August 21, 2013, the U.S. Court of Appeals for the Second Circuit decided a case that had been held in abeyance pending the Supreme Court's decision in *Kiobel*, *Balintulo et al. v. Daimler AG, Ford Motor Co., and IBM Corp.*, 727 F.3d 174 (2d. Cir. 2013). Defendants in the case sought a writ of mandamus from the court of appeals to the district court to resolve the ATS claims in their favor. Plaintiffs sought damages from the named corporate defendants for alleged aiding and abetting of violations of customary international law committed by the South African government during the apartheid era. The court of appeals denied the writ as unnecessary because the *Kiobel* decision, along with the opportunity to move for dismissal in the district court, would allow defendants to seek dismissal through a motion for judgment on the pleadings in the district court. The United States had submitted a statement of interest, as well as multiple amicus briefs at various stages in the long-running litigation. See *Digest 2009* at 140-44; *Digest 2008* at 236-38; and *Digest 2005* at 400-11. For further background on the case, see *Digest 2007* at 226-27 and *Digest 2004* at 354-61. Excerpts follow from the opinion of the court of appeals (with footnotes and citations to the record omitted).

_____

* * * *

As we have now made clear, *Kiobel* forecloses the plaintiffs' claims because the plaintiffs have failed to allege that any relevant conduct occurred in the United States. The plaintiffs resist this obvious impact of the *Kiobel* holding on their claims. The Supreme Court's decision, they argue,

does not preclude suits under the ATS based on foreign conduct when the defendants are American nationals, or where the defendants' conduct affronts significant American interests identified by the plaintiffs. Curiously, this interpretation of *Kiobel* arrives at precisely the conclusion reached by Justice Breyer, who, writing for himself and three colleagues, only concurred in the judgment of the Court affirming our decision to dismiss all remaining claims brought under the ATS. *See Kiobel,* 133 S.Ct. at 1671 (Breyer, J., concurring). The plaintiffs' argument, however, seeks to evade the bright-line clarity of the Court's actual holding—clarity that ensures that the defendants can obtain their desired relief without resort to mandamus. We briefly highlight why the plaintiffs' arguments lack merit.

a.

The Supreme Court's *Kiobel* decision, the plaintiffs assert, "adopted a new presumption that ATS claims must 'touch and concern' the United States with 'sufficient force' to state a cause of action." The plaintiffs read the opinion of the Court as holding only that "mere corporate presence" in the United States is insufficient for a claim to "touch and concern" the United States, but that corporate citizenship in the United States is enough. *Id.* at 11 ("[I]nternational law violations committed by U.S. citizens on foreign soil 'touch and concern' U.S. territory with 'sufficient force' to displace the *Kiobel* presumption."). Reaching a conclusion similar to that of Justice Breyer and the minority of the Supreme Court in *Kiobel*, the plaintiffs argue that whether the relevant conduct occurred abroad is simply one prong of a multi-factor test, and the ATS still reaches extraterritorial conduct when the defendant is an American national. *Id.* at 8–11.

We disagree. The Supreme Court expressly held that claims under the ATS cannot be brought for violations of the law of nations occurring within the territory of a sovereign other than the United States. *Kiobel,* 133 S.Ct. at 1662, 1668– 69. The majority framed the question presented in these terms no fewer than three times; it repeated the same language, focusing solely on the location of the relevant "conduct" or "violation," at least eight more times in other parts of its eight-page opinion; and it affirmed our judgment dismissing the plaintiffs' claims because "all the relevant conduct took place outside the United States," *id.* at 1669. Lower courts are bound by that rule and they are without authority to "reinterpret" the Court's binding precedent in light of irrelevant factual distinctions, such as the citizenship of the defendants. *See Agostini v. Felton,* 521 U.S. 203, 237–38, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997); *see also Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66–67, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). Accordingly, if all the relevant conduct occurred abroad, that is simply the end of the matter under *Kiobel*.

In the conclusion of its opinion, the Supreme Court stated in dicta that, even when claims brought under the ATS "touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application." *Kiobel,* 133 S.Ct. at 1669 (citing *Morrison v. Nat'l Austl. Bank Ltd.*, ——U.S. ——, 130 S.Ct. 2869, 2883–88, 177 L.Ed.2d 535 (2010)). As the Court observed in *Morrison*, "the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case." 130 S.Ct. at 2884. But since *all* the relevant conduct in *Kiobel* occurred outside the United States—a dispositive fact in light of the Supreme Court's holding—the Court had no reason to explore, much less explain, how courts should proceed when *some* of the relevant conduct occurs in the United States.

b.

The plaintiffs also assert that "the *Kiobel* presumption is displaced here" because of the compelling American interests in supporting the struggle against apartheid in South Africa.

These case-specific policy arguments miss the mark. The canon against extraterritorial application is "a presumption about *a statute's meaning.*" *Morrison*, 130 S.Ct. at 2877 (emphasis supplied). Its "wisdom," the Supreme Court has explained, is that, "[*r*]*ather than guess anew in each case*, we apply the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects." *Id.* at 2881 (emphasis supplied). For that reason, the presumption against extraterritoriality applies to the *statute*, or at least the part of the ATS that "carries with it an opportunity to develop common law," *Sosa*, 542 U.S. at 731 n. 19, 124 S.Ct. 2739, and "allows federal courts to recognize certain causes of action," *Kiobel*, 133 S.Ct. at 1664. In order "to rebut the presumption, the ATS [*i.e., the statute*] would need to evince a clear indication of extraterritoriality." *Id.* at 1665 (quotation marks omitted). Applying this approach in *Kiobel*, the Supreme Court held as a matter of statutory interpretation that the implicit authority to engage in common-law development under the ATS does not include the power to recognize causes of action based solely on conduct occurring within the territory of another sovereign. In *all* cases, therefore the ATS does not permit claims based on illegal conduct that occurred entirely in the territory of another sovereign. In other words, a common-law cause of action brought under the ATS cannot have extraterritorial reach simply because some judges, in some cases, conclude that it should.

* * * *

b. Sarei v. Rio Tinto

On June 28, 2013, the U.S. Court of Appeals for the Ninth Circuit affirmed the district court's dismissal of the claims in *Sarei v. Rio Tinto* in accordance with a remand order from the U.S. Supreme Court issued on the basis of the Court's decision in *Kiobel*. 722 F.3d 1109 (9th Cir. 2013). See *Digest 2011* at 137 for background on the case. See also *Digest 2001* at 337-39; *Digest 2002* at 333–43, 357, 574–75; *Digest 2006* at 431–50; Digest 2007 at 227-31; *Digest 2008* at 238–44.

C. ACT OF STATE AND POLITICAL QUESTION DOCTRINES

1. *Bernstein v. Kerry*

On April 1, 2013, the United States filed a motion to dismiss in a case brought by Americans residing in Israel challenging the U.S. provision of foreign assistance to the Palestinian Authority and for the West Bank and Gaza. Among other things, plaintiffs' complaint asserts that the U.S. government failed to comply with certain limits and requirements, including those relating to support for terrorism, in statutes authorizing foreign assistance to the Palestinian Authority and other organizations active in the West Bank and Gaza. The plaintiffs asked the U.S. District Court for the District of Columbia to grant mandamus relief compelling the U.S. government to seek recovery of these funds. The U.S. brief in support of its motion to dismiss presents three arguments:

first, that the plaintiffs lack standing; second, that the case presents a political question; and third, that there is no mandamus jurisdiction or any other identified right of action. The excerpt below comes from the section of the brief on the political question doctrine. The brief in its entirety is available at www.state.gov/s/l/c8183.htm. The U.S. reply brief is also available at www.state.gov/s/l/c8183.htm. On August 26, 2013, the district court issued its opinion granting the motion to dismiss based on the plaintiffs' lack of standing. *Bernstein v. Kerry*, 962 F. Supp. 2d 122 (D.D.C. 2013).

* * * *

Plaintiffs' claims in this action should also be dismissed as nonjusticiable pursuant to well established principles of the political question doctrine. The political question doctrine, the roots of which go back to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165-66 (1803), counsels courts to abstain from ruling on questions properly reserved to the political branches of government. The Supreme Court has set forth the following formulation for determining whether an issue constitutes a political question:

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962). For the doctrine to apply, the Court "need only conclude that one [*Baker*] factor is present, not all." *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005).

While not every case that touches on foreign affairs presents a political question, those which challenge Executive Branch foreign policy determinations do:

> [T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex and involve large elements of prophecy. . . . They are decisions of a kind for which the Judiciary has neither the aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948); accord *Haig v. Agee*, 453 U.S. 280, 292 (1981) ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention."); *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 45 (D.D.C. 2010) ("An examination of the specific areas in which courts have invoked the

political question doctrine reveals that national security, military matters and foreign relations are 'quintessential sources of political questions.'" (quoting *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 841 (D.C. Cir. 2010)).

Whether a question is justiciable turns on whether it presents a legal question or a policy question that turns "'on standards that defy judicial application.'" *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1430 (2012) (quoting *Baker*, 369 U.S., at 211). The questions that Plaintiffs seek to litigate in this case, to the extent that they have any meaningful content, are foreign policy questions that are constitutionally committed to the political branches and for which there are no judicially manageable standards.

Plaintiffs seek to have this Court second guess policy decisions to provide, and the manner in which the Government provides, foreign assistance to the Palestinian Authority and for the West Bank and Gaza. But these determinations are quintessentially policy-based determinations of the kind that are committed to the political branches. See, *e.g.*, *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17, 23 (D.C. Cir. 1999) (holding that whether a particular organization "threatens the security of the United States" is not justiciable because "it is beyond the judicial function for a court to review foreign policy decisions of the Executive Branch"). As described above, Congress has set forth certain conditions relating to foreign assistance to the Palestinian Authority and for the West Bank and Gaza, but those conditions charge the President and Secretary of State with determining whether there is a factual basis to certify to conditions or to waive restrictions based upon an assessment of the national security interests of the United States. Many of the conditions on the provision of assistance for the West Bank and Gaza or the Palestinian Authority are contained in the annual appropriations act for the Department of State and the U.S. Agency for International Development, which Congress generally modifies and enacts each year. To the extent that Plaintiffs raise questions about the nature of the Palestinian Authority, such as whether it is actually a state, or whether it is controlled by HAMAS, these too are clearly determinations committed to the political branches. *E.g.*, *United States v. Pink*, 315 U.S. 203, 229 (1942) (President's recognition power is "not limited to a determination of the government to be recognized" but "includes the power to determine the policy which is to govern the question of recognition. Objections to the underlying policy as well as objections to recognition are to be addressed to the political department and not to the courts.").

Finally, Plaintiffs' challenge to foreign policy assessments such as whether the United Nations Relief and Works Agency (UNRWA) complies with the conditions on which the U.S. has provided contributions are similarly barred by the political question doctrine. The determination of what constitutes adequate steps and whether a foreign entity is meeting them are policy judgments for which there are no judicially manageable legal standards. See, *e.g.*, *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) ("policies in regard to the conduct of foreign relations [and] the war power . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference"); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918) ("The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—'the political'—departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision."); *Ange v. Bush*, 752 F. Supp. 509, 513 (D.D.C. 1990) ("The judicial branch . . . is neither equipped nor empowered to intrude into the realm of foreign affairs where the Constitution grants operational powers only to the two political branches and where decisions are made based on political and policy considerations. The far-

reaching ramifications of those decisions should fall upon the shoulders of those elected by the people to make those decisions.").

Plaintiffs' complaint makes clear that this suit is merely an "attempt to litigate [their] disagreement with how this country's foreign policy is managed," and such policy disagreements are properly resolved within the political branches, and are thus nonjusticiable. *Eveland v. Director of CIA*, 843 F.2d 46, 49 (1st Cir. 1988). Plaintiffs, for example, complain that the Secretary of State could not have reached certain conclusions about the Palestinian Authority's efforts to combat terrorism because, in Plaintiffs' view, the Palestinian Authority has "not taken reasonable steps to arrest terrorists," among other things. See Compl. ¶ 116. Assuming that the Secretary of State has reached a conclusion contrary to Plaintiffs' view of the world, the judicial process is inherently ill-suited to the resolution of such disputes. Where, as here, the proper venue for the resolution of a disputes is in the political branches, the Court should dismiss the case as nonjusticiable.

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2. *Alaska v. Kerry*

See Chapter 4.B.2. for discussion of the district court's opinion in *Alaska v. Kerry*, which included consideration of the political question doctrine.

Cross References

Piracy, **Chapter 3.B.6.**
Zivotofsky *case regarding executive branch authority over state recognition*, **Chapter 9.C.**
Ahmed v. Magan *(TVPA)*, **Chapter 10.B.4.**
Manoharan v. Rajapaksa *(TVPA)*, **Chapter 10.C.**
Permit for new international trade crossing in Detroit, **Chapter 11.F.2.**
Daimler AG v. Bauman (*TVPA)*, **Chapter 15.E.2.**